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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-6277

JEROME ROSENBERG,

Petitioner,

—against—

RAYMOND V. MARTIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PETITION NOT PRINTED

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-6227

JEROME ROSENBERG,

Petitioner,

—against—

RAYMOND V. MARTIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

The petitioner, who is serving a life sentence in Sing Sing prison for the first-degree murders of two policemen, brought an action in the U.S. District Court for the Eastern District of New York, under 42 U.S.C. §1983, alleging that his civil rights were infringed in (1) that public statements by respondent, then an Assistant Chief Inspector of the Police Department, made prior to and at the time of petitioner's arrest, had the effect of depriving him of a fair trial on the criminal charges and "maliciously" defamed him, and (2) that he was assaulted by respondent. Both claims were submitted to a jury which returned a general verdict in petitioner's favor of $7500.

On appeal, the U.S. Court of Appeals for the Second Circuit (FRIENDLY, C.J., LUMBARD and THOMSEN, JJ.), by order

made April 27, 1973, unanimously reversed the judgment (with an 11-page opinion) and remanded the action to the District Court with instructions to dismiss the complaint. The Court of Appeals held that the claim relating to respondent's pre-trial statements was not a claim within 42 U.S.C. §1983, unless a *constitutional* right had been infringed. Here a constitutional claim is presented by the allegation that statements made by respondent deprived petitioner of a fair trial on the criminal charges (within the 6th and 14th Amendments). That claim was held defeated here by the doctrine of *res judicata*. The precise issue had been litigated in the state courts, on a motion to change venue. *People* v. *Portelli and Rosenberg*, 15 NY2d 235 (1965), remittitur amended 16 NY2d 537 (1965), cert. den. 382 U.S. 1009 (1966). It had also been litigated in the federal courts, on a *habeas* application. There it was specifically held that the trial on the criminal charge was a fair one and had *not* been tainted by pre-trial publicity. *U. S. ex rel. Rosenberg* v. *Mancusi*, 445 F.2d 613 (2nd Cir., 1971), cert. den. 405 U.S. 956 (1972).

The "assault" claim was "assumed" to be a claim within 42 U.S.C. §1983, but this claim, asserted by a belated amendment to the original complaint, was held to be barred by the statute of limitations.

The Court rejected the *possibility* that the "pre-trial publicity" claim could be construed as a constitutional claim of "invasion of privacy".

Issues Presented

1. Did respondent's statements constitute an invasion of petitioner's constitutional right of privacy?

2. Was petitioner's claim that publicity attributed to respondent violated petitioner's constitutional right to a fair trial on the criminal charge (under the 6th and 14th Amendments of the U.S. Constitution) barred by the doctrine of *res judicata* where this precise contention had been urged by petitioner, and rejected by the courts, in a federal *habeas* proceeding?

3. Did the Court of Appeals err in holding that the assault claim was barred by the statute of limitations?

Facts

We respectfully refer this court to the Court of Appeals' opinion for a comprehensive and detailed summary of the pleadings and the evidence contained there.

In view of Chief Judge Friendly's scholarly exposition of the principles of law applicable to all the issues (in which Judges Lumbard and Thomsen concurred) we shall not attempt, in this brief, to expound the various points which he treats. Suffice it to state that opinion of the Court of Appeals does not chart a new course in the law. It is based either upon decisions of this Court or upon principles well established by numerous decisions of Courts of Appeals in the various circuits. We shall confine ourselves to some summary statements of our position and some few additional observations.

POINT I

The Court of Appeals properly held that there was no violation of any constitutional right to privacy.

Judge Friendly, in writing for dismissal, was considering a possibility that petitioner's complaint, with respect to the pre-trial publicity, might be read as invoking a constitutionally protected right to privacy, as enunciated in *Griswold* v. *Connecticut*, 381 U.S. 419 (1965). The Court declined to extend that doctrine to this case—a situation well beyond the limits and rationale of any decided case.

The pre-trial statements to the press made by respondent were made while petitioner was at large and after the other two men involved with him had already been captured. Petitioner Rosenberg had been identified by several witnesses from a rogues' gallery photograph. Several police officials had made statements to the media. The statements about Rosenberg that were attributed to this respondent, then an Assistant Chief Inspector in the Department, are only these: he described the crime as had been related by witnesses (pointing out that it was Portelli had done the shooting); he stated that Rosenberg had been identified from rogues' gallery photographs by a half dozen witnesses; that Rosenberg might seek to go to Texas where his divorced wife and daughter were living; that the three men were part of a stick-up mob; that Rosenberg was dangerous. Respondent advised persons with information to call a special telephone number. (The article is Pl's Exh. I). In a second article, Inspector Martin was credited with saying that Rosenberg "reportedly was seen [the previous day] in Manhattan, dressed in women's clothing" and this fact was now being added to the alarm to warn police to be

on the alert for anyone, male or female, answering his description." There was a statement that the three men had been positively identified "in 10 other Brooklyn hold-ups" (Pl's Exh. 3). This is *all* that there was in the newspapers about Rosenberg that was attributed to Assistant Chief Inspector Martin.

A day later Rosenberg (who was then also in violation of parole after a sentence for armed robbery) appeared at the offices of the *New York Daily News*. There he was photographed, and interviewed by reporters, before there surrendering himself to police (A23).*

In his complaint petitioner set forth a claim alleging many improper statements in the media (none were proven to have come from Martin aside from those stated above). The petitioner's allegation was that these statement were "maliciously false" and were "slander". In rejecting this claim, the Court of Appeals held, in footnote 4, that defamation does not implicate any federally protected right recognizable under 42 U.S.C. §1983, citing Court of Appeals decisions from three circuits, directly in point. See also, generally, *Snowden* v. *Hughes*, 321 U.S. 1, 6-7 (1943), where it was held that 42 U.S.C. §1983 is unavailable to vindicate "a private right afforded by state laws as distinguished from a constitutional right." In addition, there was no evidence that any of these statements were untrue. No specific claim of the invasion of "privacy" was alleged in the complaint.

In discussing, and rejecting, a possible "right of privacy" claim, the Court of Appeals noted that "the interest in privacy of a fugitive suspected of a serious crime must

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* Numbers in parentheses refer to pages in the Appendix on Appeal.

yield to the public interest in his apprehension and the consequent publication of whatever may be deemed helpful to that end." In every respect, the statements related to such purpose. They did no more than depict Rosenberg as a fugitive from arrest for murder, gave information that would alert the public, and give meaningful warning that he was dangerous.

None of this involved private, personal or intimate facts. It did not involve, as in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), such intimate phases of personal life as marital privacy. Nor is there any resemblance to *York* v. *Story*, 324 F.2d 450 (9th Cir., 1963), upon which petitioner now relies, which involved the circulation of a photograph of a female *complainant* (not a criminal), *in the nude*, which Judge Friendly cited, and distinguished, in his discussion. See also, *Baker* v. *Howard*, 419 F.2d 376 (9th Cir., 1969).

One other statement is attributed by petitioner to respondent. Petitioner testified that, after he had been taken into custody at the Daily News Building (after being photographed and interviewed), he was taken by car to the police stationhouse in the precinct where the murders had occurred. He was escorted from a police car into the station through a jeering crowd that had gathered in the street. It is not indicated why the crowd was there. Perhaps they learned of this on a news broadcast resulting from the events at the Daily News Building. The crowd was hostile. According to petitioner, they were yelling: "Kill the dog", "Lynch the bastard". Petitioner testified that Inspector Martin responded to the crowd: "He's the killer, and he's going to burn" (A21). This, if said, would be a reprehensible, Judge Friendly noted. But whatever it is, it is not an invasion of petitioner's "privacy".

POINT II

Petitioner's claim that he had been denied a fair trial on the criminal charge because of publicity preceding and attendant to his arrest (8 months before the trial) was barred by *res judicata*. In any event there was no evidence to establish any such claim.

In invoking the doctrine of *res judicata* (issues preclusion) Judge Friendly did *not* rely on the state court adjudication, which included the upholding of the denial of a motion to change of venue because of unfavorable pre-trial publicity. (*People* v. *Portelli and Rosenberg*, 15 NY 2d 235 [1965], remittitur amended 18 NY 2d 537 [1965], cert. den. 382 U.S. 1009 [1966]). The court might well have relied on the state adjudications. While a state court determination is not *res judicata* in a federal *habeas corpus* proceeding, it should be conclusive where the issue is sought to be relitigated in an action for money damages. There is a basic reason for distinguishing a federal *habeas corpus* proceeding, which involves personal liberty, from a claim for money damages. See *P.I. Enterprises* v. *Cataldo*, 457 F.2d 1012 (1st Cir., 1972); *Coogan* v. *Cincinnati Bar Ass'n*, 431 F.2d 1209, 1211 (6th Cir., 1970). But it was not necessary to so hold here. Judge Friendly held that even if it were an open question whether a state court judgment should have effect by way of issue preclusion in a federal civil rights action, the precise issue—i.e. was petitioner denied a fair trial because of pre-trial publicity?—had also been determined here, against petitioner, in a Federal *habeas corpus* proceeding. (*U.S. ex rel. Rosenberg* v. *Mancusi*, 445 F.2d 613 [2d Cir., 1971]

cert. den. 405 U.S. 956 [1972]). That determination, Judge Friendly noted, was that "as a result of the lapse of time between the improper publicity in May 1962 and the trial in January, 1973, and the effective *voir dire* of the jury panel, he had received a fair trial." There is no reason why that determination should not be given *res judicata* (issue preclusion) effect on this precise issue in the instant action for money damages, where all the respondent's statements (above mentioned) were specifically referred to on that application. In holding that it was of no moment that petitioner's adversary in the criminal case was the state while here it was the police officer, Judge Friendly relied on numerous cases, in both the federal and the state courts, including this court's decision in *Blonder-Tongue Laboratories* v. *Univ. of Illinois*, 402 U.S. 313 (1971), for the now well established proposition that collateral estoppel is no longer grounded upon any requirement of mutuality.

Petitioner contends, without citing cases, that the jury should not be precluded on this issue by the prior adjudication because the *habeas corpus* proceeding had been without an evidentiary hearing. What evidence could have been introduced to show whether or not petitioner had received a fair trial in 1963 except the transcript of that criminal trial, particularly the *voir dire*. The District Court (Bartels, J.), on the *habeas* application, painstakingly reviewed that transcript. And the Court of Appeals referred to it at length in its opinion (445 F.2d 613, 617). And, if plaintiff had attempted to prove in this action for damages that he had been denied a fair trial in 1963, he could only have done so by reference to that same record.

Even if *res judicata* (issue preclusion) did not apply here, there remains a deficiency in petitioner's case. There is an absence of any evidence to show that he was deprived

of a fair trial in 1963. Unfairness and prejudice may not be presumed in this case—the trial was 8 months after the publicity. The court could take judicial notice of the record of that trial; and such record reveals that the jurors chosen had no recollection of any details of that publicity, 8 months before.

We should note also that the motion for a change of venue in the state courts and the *habeas* proceeding in the federal courts were based on pre-trial publicity from *many* sources. Respondent's statements to the press and to a crowd were included among these. It was not necessary for the courts, on those other applications, to determine *who* was responsible for these statements in order to resolve whether petitioner had received a fair trial on the criminal charges. The holdings that petitioner had received a fair trial precluded the raising of that issue as to *any* pre-trial publicity that had been presented to the courts on those applications (including petitioner's). But in order to hold respondent personally liable it would have to be proven (1) that petitioner was denied a fair trial and (2) also that it was *because* of this respondent's two statements, above described. Thus even if the claim were not barred by *res judicata*, as it is, it would still fail on account of an absence of proof.

Recognizing this failure of proof, petitioner now alters his claim to allege that respondent created "an intolerable risk" of an unfair trial. This related change of language does not alter anything. If there were any significant risk, much less an intolerable risk, that the conviction of a capital crime was based on an unfair trial the federal courts would have granted a new trial in the *habeas corpus* proceeding. It was precisely because the *voir dire* at the trial had indicated that the jurors had no knowledge or memory of facts reported in the press that the 1963 criminal trial

was held not to have been tainted. And on this issue, this Court has twice denied petitions for certiorari (382 U.S. 1009, 405 U.S. 956).

POINT III

The Court of Appeals properly held that the assault claim was barred by the statute of limitations.

On this point, Judge Friendly "*assumes* that brutal police conduct violates the Fourteenth Amendment," citing cases from the 4th Circuit. The weight of authority in the Court of Appeals seems so to hold.

The question as to this claim involves the application of a state statute of limitations. Petitioner does not dispute the well established principle that the statute of limitations that is to be applied to actions under 42 U.S.C. §1983 is the analogous state statute. He agrees that, in this case, that statute is New York's Civil Practice Act §48 (6 yrs.) governing causes of action created by statute.*

The original claim (which was concededly timely) was based *only* on pre-trial publicity. The "assault" claim was first asserted, by amendment, 18 months later, after the expiration of the 6-year period. The question, under federal law (FRCP §15[c]), was whether the claim asserted by the amendment "related back" to the original complaint, so that it could be said to have been commenced at the same time as the original action. Petitioner, for the first time, maintains a new theory here: that the amendment

* The applicable statute, since September 1, 1963 is New York Civil Practice Law and Rules §208, a 3-year period. But since this claim arose prior to September 1, 1963, petitioner has the benefit of the prior statute, the Civil Practice Act.

should relate back because the assault was, in his words, part of a "continuing pattern of conduct." It is not apparent just what this "pattern" is. There is no obvious relation between the information given to the press or to a crowd by respondent and an alleged physical assault. The law is well settled, as Judge Friendly stated, that an amendment relates back to the original complaint if the original complaint gave "notice" of such a claim. This is supported by unanimous, and some "strikingly similar" authority. See citations in 3 MOORE, *Fed. Prac.*, §15.15[3], p. 1026; 1A BARRON and HOLTZOFF, *Fed. Prac. and Proc.*, §448, p. 754; 4 WRIGHT and MILLER, *Fed. Prac. and Proc.* (1969), §1497, pp. 48 *et seq.* There is no attempt to challenge Judge Friendly's statement that "on the most liberal reading not a word in the complaint suggested a claim of physical assault."

The second argument was not raised before. It is based on an interpretation of the New York statute, which indicates when a New York period of limitations may be tolled. That is a question of state law and not the kind of issue of very limited application, which this Court would normally review. In any event, the argument is without any basis. New York's tolling provision [then Civil Practice Act §43, and, since Sept. 1, 1963, similarly in CPLR 208] operates to toll a statute of limitations for one in prison serving "a term less than life." Petitioner construes this statute as tolling the period of limitations while he was under sentence of death [which was commuted to life imprisonment in 1965]. This is based on the supposition that a death sentence is a sentence "less than life." To state this proposition is to rebut it.

Petitioner here had a full six years during which he could have brought this action. That is more than is provided in most other circuits, where tolling provisions are not applied: *Jones* v. *Bombeck,* 375 F.2d 737 (3d Cir., 1967); *Knowles* v. *Carson,* 419 F.2d 369 (5th Cir., 1969); *Harrison* v. *Wright,* 457 F.2d 793 (6th Cir., 1972). It was enough time here. The original action, based solely on pre-trial publicity, was commenced timely. It was only when, as an obvious afterthought, petitioner sought to assert a distinctly different claim of physical assault, 18 months after the original complaint, and more than 6 years after that claim arose, that the New York statute of limitations was properly applied to bar such claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

June 18, 1973

Respectfully submitted,

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